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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PRE-SCHOOL OWNERS ASSOCIATION OF ILLINOIS, an Illinois Not-For-Profit Corporation; **BURTON D. MILLER**; and **CROSSROADS CAMPUS, INC.**, an Illinois Corporation,

Appellants,

v.

STATE OF ILLINOIS, DEPARTMENT OF CHILDREN AND FAMILY SERVICES; and **GORDON JOHNSON**, Its Director,

Appellees.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The Appellees, State of Illinois, Department of Children and Family Services; and Gordon Johnson, its Director, respectfully move this Honorable Court to dismiss this appeal on the following grounds:

1. The appeal is not within this Court's jurisdiction.

2. The appeal does not present a substantial federal question.

In the alternative, the Appellees move this Court to affirm the judgment of the Supreme Court of Illinois, on the grounds that it is manifest that the questions on which the decision of the cause depends are not so substantial as not to need further argument.

ARGUMENT

I.

THIS APPEAL SHOULD BE DISMISSED BECAUSE NO FINAL JUDGMENT WAS RENDERED BY THE SUPREME COURT OF ILLINOIS AS REQUIRED BY 28 U.S.C. § 1257.

Appellants filed an eight count Amended Complaint on May 3, 1985. Count I of the Complaint challenged § 2.09 of the Child Care Act of 1969 ("the Act"), Ill. Rev. Stat. 1985, ch. 23, § 2211 et seq. which exempted certain religious and educational programs from regulation under the Act. § 2.09 provided as follows:

> "(a) [P]rograms operated by public or private elementary school systems or secondary level school units or institutions of higher learning which serve children who shall have attained the age of 3 years; (b) programs or that portion of the program which serves children who shall have attained the age of 3 years and which are recognized by the State Board of Education; (c) educational program or programs serving children who shall have attained the age of 3 years and which are operated by a school which is registered with the State Board of Education and which is recognized or accredited by a recognized national or multistate educational organization or association which regularly recognizes or accredits schools; (d) programs which exclusively serve or that portion of the program which serves handicapped children who shall have attained the age of 3 years but are less than 21 years of age and which are registered and approved as meeting standards of the State Board of Education and applicable fire marshall standards; (e) facilities operated in connection with a shopping center or service, religious services, or other similar facility, where transient children are cared for temporarily while parents or custodians of the children are

> occupied on the premises and readily available; (f) any type of day care center that is conducted on federal government premises; (g) special activities programs, including athletics, crafts instruction and similar activities conducted on an organized and periodic basis by civic, charitable and governmental organizations; (h) part day child care facilities, as defined in Section 2.10 of this Act; or (i) programs or that portion of the program which (1) serves children who shall have attained the age of 3 years, (2) is operated by churches or religious institutions as described in Section 501(c)(3) of the federal Internal Revenue Code, (3) receives no governmental aid, (4) is operated as a component of a religious, nonprofit elementary school, (5) operates primarily to provide religious education, and (6) meets appropriate State or local health and fire safety standards."

Ill. Rev. Stat., 1985, ch. 23, § 2212.09.

Appellants claimed that the exemptions violated the equal protection and due process clauses of the Fourteenth Amendment to the U.S. Constitution. In Count II, Plaintiffs challenged § 2.09 as violative of the First Amendment to the U.S. Constitution. In Count III, the same section was alleged to be special legislation in violation of the Illinois Constitution. Count IV challenged various rules adopted by the Illinois Department of Children and Family Services ("DCFS") as violative of the Fourteenth Amendment to the U.S. Constitution due to their vagueness. Also challenged was § 407.10(c) of the DCFS regulations. 89 Ill. Admin. Code, ch. III, § 407.10(c) (1985). This regulation barred from child care employment individuals identified as having committed child abuse or neglect and persons awaiting trial and investigation on these charges. Count V of the First Amended Complaint alleged that "a substantial number of the regulations promulgated by DCFS are in excess of the authority conferred upon them

by statute. . ." Count VI challenged under the Fourteenth Amendment to the U.S. Constitution the lack of procedures by which a day care center could continue to operate while challenging a license revocation at the time its license expires. Count VII challenged on due process grounds the lack of procedures by which an applicant for a license could continue to operate while challenging the failure to issue a full license. Count VIII claimed that a regulation which limited the space capacity of a day care center with infants or toddlers deprived plaintiffs of property without due process.

Citing concern for judicial economy, the trial judge only considered the first four counts of the Complaint. After finding in favor of plaintiffs on these counts and ruling that the exemptions and § 407.10(c) were unconstitutional, the trial court made a finding pursuant to Rule 304(a) of the Illinois Supreme Court Rules, Ill. Rev. Stat., 1985, ch. 110A, § 304(a). The rules permit a finding of "no just reason for delaying enforcement or appeal," when fewer than all claims have been adjudicated. A direct appeal thereafter ensued to the Illinois Supreme Court.

The Illinois Supreme Court reversed the finding of the trial court that the exemptions were violative of the First and Fourteenth Amendments. It remanded the case to the trial court to determine whether plaintiff had standing to challenge § 407.10(c) of the DCFS regulations. No final judgment was rendered by the Supreme Court of Illinois in this matter. There are still four counts pending in the state trial court, three of which raise federal constitutional challenges upon which the Illinois Supreme Court has not ruled. In addition, the remand to the trial court for a determination on the appellants' standing contemplates further proceedings which bear directly upon the constitutional issues raised by appellants.

Finality as a condition precedent to review is an historic characteristic of this Court's appellate jurisdiction. The object of this requirement has been to have the whole case and every matter in controversy decided in a single appeal. *McLish v. Roff*, 141 U.S. 661, 665 (1891). By enforcing the finality requirement, this Court is saved the needless expense, delays and labors of several successive appeals in the same case. *See id.* at 667. *See also Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985). Strict compliance with this rule also avoids premature and inappropriate adjudications of constitutional issues. Thus, the party seeking review of a state court's judgment "has the burden of affirmatively establishing this Court's jurisdiction," *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 70-71 (1948), with any doubts resolved against its exercise. *See id.*

This Court's demand in *Republic Natural Gas* for a final judgment comports with the stringent finality requirement of 28 U.S.C. § 1257. No single formula, however, can fully explain the finality doctrine. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). A final judgment usually is defined to mean "one which ends the litigation on the merits and leaves nothing for the courts to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Accordingly, appellate decisions which anticipate further state court proceedings are not considered final for purposes of this Court's jurisdiction, *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 632-33 (1981), but for a "very few" cases in which the further proceedings involve only state law issues completely dissociated from the federal issues that have been adjudicated, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975) (*quoting Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)), and a "small class" of decisions

excluded under the collateral order exception. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

In *Cox*, four categories of cases were delineated where this Court has treated as final, state court decisions on a federal issue which leave further proceedings pending in lower state courts. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 479, 483. This appeal does not fall into any of these categories.

Here, there is still a federal issue to be decided independently of the federal issues already resolved. There is no danger of later preclusion of review of the federal issues already decided by the Illinois Supreme Court. All federal issues will be reviewable in this Court at the conclusion of the state court litigation. Any ruling by this Court of federal issues already decided by the Illinois Supreme Court would have no effect on the other federal issues which are still pending in the state trial court, and could not serve to terminate the litigation.

Appellants can find no more solace in the collateral order exception to the finality doctrine than they did in *Cox*. Finality is not established merely because a major issue in the case has been decided. *See Republic Natural Gas*, 334 U.S. at 68. To justify an immediate appeal during ongoing litigation by resort to the collateral order exception, a litigant must satisfy three separate criteria. The order from which appeal is sought must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (construing *Cohen*). Appellants cannot establish these criteria.

First, the decision of the Supreme Court of Illinois did not conclusively determine a dispute issue—the alleged unconstitutionality of § 407.10(c) of the promulgated DCFS regulations. The Supreme Court of Illinois specifically declined to adjudicate the constitutionality of this regulation, but instead remanded to the trial court to determine plaintiffs' standing to challenge the provision. *Compare Parr v. United States*, 351 U.S. 513, 519 (1956) (collateral order exception does not apply when contested order decides only one part of case and thus is but a "step toward final disposition of the merits of the case" which will "be merged into a final judgment," quoting *Cohen*, 377 U.S. at 546.)

Furthermore, the constitutionality of § 407.10(c) will be reviewable at the conclusion of this litigation—whatever the ultimate factual and legal determinations are regarding plaintiff's standing to challenge this section. In *Republic Natural Gas*, this Court made clear that when only one segment of a case has been decided, the case is not "ripe for review by this Court." 334 U.S. at 72 (quoting *Collins v. Miller*, 252 U.S. 364, 371 (1920)). *Republic Natural Gas* thus reflects this Court's practice, mandated by 28 U.S.C. Section 1257, of reviewing all of the federal issues presented in a case upon conclusion of the entire litigation. *See also Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973) (prior dismissal of Supreme Court case did not establish law of the case or *res judicata* on points raised in first appeal; those issues thus can be raised in second request for Supreme Court review); and *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258-59 (1916) (refusal to grant *certiorari* to review interlocutory order does not, upon conclusion of case and a second petition for *certiorari*, prevent Supreme Court from reviewing issues presented in first petition).

Appellants cannot escape the finality requirement of § 1257(2). For this Court to accept appellants' plea that jurisdiction be asserted here would undermine every policy underlying the finality requirement and would neither advance the progress of this litigation nor the legitimate interests of the parties.

This litigation will not be concluded without substantial further proceedings in state court which involve the decision of additional federal questions. Absent in this case is a key factor present where this Court has made an exception to the final order requirement in the past: an assurance that the additional state court proceedings will not involve "the decision of other federal questions that might also require review by the [United States Supreme] Court at a later date . . ." *Cox*, 420 U.S. at 477.

Adhering to the finality requirement and deferring review until the litigation is concluded in the state court would allow this Court to address the constitutionality of the Illinois Child Care Act, taken as a whole, in a single appeal. This appeal should therefore be dismissed because it is not brought pursuant to a final judgment of the Supreme Court of Illinois.

II.

APPELLANTS PRESENT NO SUBSTANTIAL QUESTIONS WHICH REQUIRE REVIEW BY THIS COURT.

The federal issues which were decided by the Supreme Court of Illinois comport with well established principles set forth by this Court. There is no showing by appellants of any dispute within the circuits or of any crucial issue which requires resolution by this Court. The mere fact that many states have the religious exemption of which appellants complain is not sufficient cause for this Court

to review the questions presented by appellants. The appeal should therefore be dismissed because there are no substantial issues presented which require immediate resolution by this Court.

A. The Challenged Exemptions Are Not Violative Of The Establishment Clause Of The First Amendment.

Appellants contend that the exemptions are prohibited by the Establishment Clause of the First Amendment to the U.S. Constitution because they promote and abet religious institutions. It is well settled, however, that the government may accommodate religious practices and promulgate laws which permit churches to advance religion. *Hobbie v. Unemployment Appeals Commission of Fla.*, 480 U.S. ____, 107 S.Ct. 1046, 1051 (1987); *Corporation of Presiding Bishop v. Amos*, 483 U.S. ____, 107 S.Ct. 2862, 2868-69 (1987).

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971) this Court established a three part test to determine whether legislation violates the Establishment Clause of the First Amendment to the Constitution of the United States.

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243, 99 S.Ct. 1923, 1926, 20 L.Ed.2d 1060 (1968); finally, the statute must not foster "an excessive government entanglement with religion."

See id. at 612-13 (quoting *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 674 (1970)).

In *Amos*, this test was further elucidated and refined. Its application to the exemptions to the Act adopted by the Illinois Legislature reveals the exemptions to be lawful and not in contravention of the First Amendment.

Amos involved the constitutionality of § 702 of the Civil Rights Act of 1964 which exempted religious organizations from claims of religious discrimination. 42 U.S.C. § 2000e-1. Appellee had worked for 16 years as a building engineer for the Church of Jesus Christ of Latterday Saints. He was discharged because he could not show that he was a member eligible to attend its temples. Application of the *Lemon* test by the Court resulted in the determination that appellee could not press his religious discrimination claim against the Church. The same conclusion results here upon application of the relevant factors.

Lemon first requires a "secular legislative purpose." 403 U.S. at 612. Such a purpose is served when government alleviates "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at ____, 107 S.Ct. at 2868. Exempting sectarian day care programs from the strictures of the Act challenged here serves such a secular purpose. When these sectarian programs are exempt, the State's involvement in matters of religion is lessened. It is also relevant that the statute is narrowly drawn and only applies when the sectarian program is a component of an elementary school. *Pre-School Owners Association of Illinois, Inc. v. Department of Children and Family Services, et al.*, 119 Ill.2d 268, 280, 518 N.E.2d 1018, 1024 (1988).

Amos, teaches that the second requirement of the *Lemon* test does not mean that churches cannot advance their religion. "For a law to have forbidden 'effects' under *Lemon*, it must be fair to state that the *government itself* advanced religion through its own activities and influence." *Amos*, 483 U.S. at ____, 107 S.Ct. at 2869 (emphasis in original). There is no prohibition under the First Amendment against "lifting a regulation that burdens the exer-

cise of religion" nor is there a requirement "that the exemption comes packaged with benefits to secular entities." *See id.* There is no action that the government takes under the Act which advances religion. It is also relevant that religious day care centers are not singled out for favored treatment under § 2.09 because public and non-sectarian private day care centers which are part of a school or educational institution are also exempt. *Pre-School Owners Association*, 119 Ill.2d at 281, 518 N.E.2d at 1024-25.

There is also no risk of excessive entanglement of the state with religion as a result of the exemption to sectarian schools. Exemption avoids government involvement with church matters. "[T]he statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief" which licensing and the ensuing litigation would require. *Amos*, 483 U.S. at ____, 107 S.Ct. at 2870. Plaintiff's contention that § 209(i) will make it necessary for DCFS to determine which elementary schools are religious and which are not (see plaintiff's jurisdictional statement, p. 8) is untenable. It is not supported by any case law or any facts in the record. Under such reasoning, no exemption of any sectarian organization would ever be permissible because the government would, *ipso facto*, entangle itself with the exempt religious organization. Surely, this is not what this Court means when it speaks of "excessive entanglement."

Appellants rely primarily upon *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230 (4th Cir. 1984), *appeal after remand*, 789 F.2d 295 (4th Cir. 1986). After this Court announced its decision in *Amos*, the Fourth Circuit recently reversed itself and upheld the exemption of religiously affiliated child care centers from state licensing requirements in Virginia, based on the *Amos* ra-

tionale. *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, ____ F.2d ____, No. 87-3713 (4th Cir. May 6, 1988). The same analysis supports the constitutionality of the exemptions challenged here on First Amendment grounds.

B. The Exemptions Do Not Deprive Appellants Of Equal Protection Or Due Process.

Appellants challenge the exemption of schools and institutions that come within the authority of the State Board of Education as violative of the equal protection and due process clause. This Court has held on numerous occasions that states are given wide latitude in the regulation of their economies. *New Orleans v. Dukes*, 427 U.S. 297 (1976). Where a fundamental right or a suspect class is not implicated, the government must only demonstrate that a challenged classification is rationally related to a legitimate state interest. *See id.* 427 U.S. at 303-304. Legislatures are presumed to have acted constitutionally and statutory classifications will only be set aside if no grounds can be conceived to justify them. *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 809 (1969). A legislature may act one step at a time and need not eradicate the entire evil sought to be eradicated. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955).

The Supreme Court of Illinois found that there was a rational relationship between exempting programs that are affiliated with schools and those that are not. It is rational to conclude that programs which are registered with the Illinois Board of Education or are affiliated with schools already "have available to them, the staff, facilities, and experience deemed necessary for their safe and beneficial operation." *Pre-School Owners Association*, 119 Ill.2d at 277, 518 N.E.2d at 1023. There is certainly ample

grounds upon which to justify the classifications and appellants' attempt to set them aside is unconvincing. No equal protection or due process violation can be shown by appellants based upon the challenged classifications.

C. The Regulations Promulgated By DCFS And Challenged As Unconstitutionally Vague Comport With Due Process.

Appellants challenged various regulations promulgated by DCFS as violative of due process because they were allegedly so vague that licensees were not put on notice of the DCFS requirements. The Supreme Court of Illinois carefully reviewed these terms and did not find them "so vague that men of common intelligence must necessarily guess" at their meaning or differ as to their application. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The Court pointed out that the challenged terms are sufficiently specific to guide individuals engaged in the "child care profession." *Pre-School Owners Association*, 119 Ill.2d at 286, 518 N.E.2d at 1027. The Court also noted that under the Act, individuals may seek the Department's guidance with regard to licensure requirements. *Id.* at 285, 518 N.E.2d 1027. There is no basis to conclude that the Supreme Court of Illinois erred in its assessment of ascertainability of the challenged regulations. These regulations are sufficiently precise and should be upheld.

CONCLUSION

For the foregoing reasons, the Appellees, State of Illinois, Department of Children and Family Services; and Gordon Johnson, its Director, move for dismissal of this

appeal, or in the alternative, for affirmance of the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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